Supreme Court, U.S.
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No. 991389

In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

versus

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

M. BYRON LEWIS
Counsel of Record
JOHN B. WELDON, JR.
STEPHEN E. CROFTON
SALMON, LEWIS & WELDON, P.L.C.
4444 North 32nd Street, Suite 200
Phoenix, Arizona 85018
(602) 801-9060
Attorneys for Petitioners Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District

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QUESTION PRESENTED FOR REVIEW

Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?

PARTIES TO THE PROCEEDING IN THE ARIZONA SUPREME COURT

This petition for a writ of certiorari arises out of massive general stream adjudication proceedings pending in the State of Arizona. The actions involve more than 27,000 parties and over 77,000 claims. *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 186 (Ariz. 1999). In addition to the petitioners and respondents herein, the following parties participated in the proceedings before the Arizona Supreme Court which are sought to be reviewed by this petition:

State of Arizona
City of Phoenix, Arizona
City of Chandler, Arizona
City of Glendale, Arizona
City of Mesa, Arizona
City of Scottsdale, Arizona
City of Tucson, Arizona
City of Sierra Vista, Arizona
City of Benson, Arizona
Town of Gilbert, Arizona
City of Globe, Arizona
Town of Mammoth, Arizona
Town of Patagonia, Arizona
City of Flagstaff, Arizona
City of Tempe, Arizona
Magma Copper Company
Apache Nitrogen Products Association
Arizona Rock Products Association
Arizona Public Service Company
Roosevelt Water Conservation District
Aztec Land and Cattle Company, Ltd.
Cyprus Christmas Mine Corporation

PARTIES TO THE PROCEEDING IN THE ARIZONA SUPREME COURT – Continued

Cyprus Miami Mining Corporation
Cyprus Pima Mining Corporation
Cyprus Sierrita Corporation
Cyprus Twin Buttes Corporation
Stone Container Corporation
ASARCO Incorporated
Phelps Dodge Corporation
Buckeye Irrigation Company
Buckeye Water Conservation and Drainage District
Members of the Gila Bend-Dendora Valley Water Users Association
Gila Valley Irrigation District
Franklin Irrigation District
Tenneco West, Inc.
Tenneco Arizona Properties Corporation
Arlington Canal Company
Bella Vista Ranches Limited Partnership
Bella Vista Water Company, Inc.
Cortaro-Marana Irrigation District
Pima County, Arizona
Cortaro Water Users' Association
Rigby Water Company
Valencia Water Company, Inc.
Little Colorado Water Association
Rio Rico Properties, Inc.
Pinetop-Woodland Irrigation Company
Woodland Irrigation Company
Ponderosa Domestic Water Improvement District
Roosevelt Irrigation District
Wayne D. Klump

CORPORATE DISCLOSURE STATEMENT

Petitioner Salt River Valley Water Users' Association ("SRVWUA") is a private corporation organized under the laws of the State of Arizona. There is no parent corporation or publicly held company owning ten percent or more of SRVWUA's stock. (Rule 29.6, Rules of the Supreme Court of the United States.)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING IN THE ARIZONA SUPREME COURT	ii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
I. THE NATURE AND SCOPE OF THE PENDING PROCEEDINGS	3
II. THE RULINGS BELOW	8
REASONS FOR GRANTING THE WRIT	10
I. APPLICABILITY, IF ANY, OF THE FEDERAL RESERVED RIGHTS DOCTRINE TO GROUNDWATER IS AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION THAT HAS PROMPTED CONFLICTING STATE COURT DECISIONS	10
II. THE DECISION BELOW WOULD CREATE GRAVE, UNIQUE PROBLEMS THROUGHOUT ARIZONA	15
III. THE RULING BELOW IS NOT MANDATED BY PREVIOUS DECISIONS OF THIS COURT AND UNNECESSARILY SUPPLANTS STATE LAW	23
CONCLUSION	29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. California, 373 U.S. 546 (1963) 5, 7, 11

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 4

Cappaert v. United States, 426 U.S. 128 (1976) 6-7, 11, 18, 20, 24

Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386 (Ct. Cl.), *cert. denied*, 419 U.S. 1021 (1974) 18

Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct. Cl. 1982) 21

Lassen v. Arizona, 385 U.S. 458 (1967) 19

O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79 (1994) 23

United States v. District Court for Eagle County, 401 U.S. 520 (1971) 11

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 23

United States v. New Mexico, 438 U.S. 696 (1978) ..11, 24

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 24

United States v. Wightman, 230 F. 277 (D. Ariz. 1916) 18

White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981) 28

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 23

TABLE OF AUTHORITIES – Continued

Page

Winters v. United States, 207 U.S. 564 (1908) 6, 10-11, 15, 25-27

Wyoming v. United States, 492 U.S. 406 (1989)..... 10

STATE CASES

Bristor v. Cheatham, 255 P.2d 173 (Ariz. 1953)..... 6

City Mill v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929) 27

Confederated Salish and Kootenai Tribes v. Clinch, No. 97-609, 1999 WL 1271753 (Mont. Dec. 30, 1999) 12

Denis v. Kickapoo Land Co., 771 S.W.2d 235 (Tex. App. 1989, *writ. denied*)..... 27

Fain Land & Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990) 19-20

In re the General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *aff'd on other grounds by an equally divided Court sub nom.* 492 U.S. 406 (1989)..... 10-12

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 857 P.2d 1236 (Ariz. 1993) 4, 6

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739 (Ariz. 1999) ..... *passim*

In re the Rights to the Use of the Gila River, 830 P.2d 442 (Ariz. 1992) 8-9

Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 4 P.2d 369 (Ariz. 1931) 4, 6

TABLE OF AUTHORITIES – Continued

Page

San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999) ii

Town of Chino Valley v. City of Prescott, 638 P.2d 1324 (Ariz. 1981), *appeal dismissed*, 457 U.S. 1101 (1982) 5, 28

United States v. Superior Court, 697 P.2d 658 (Ariz. 1985) 4, 16

STATUTORY PROVISIONS

UNITED STATES CODE

28 U.S.C. § 1257(a) 1

43 U.S.C. § 666 (the McCarran Amendment) 4

UNITED STATES STATUTES AT LARGE

15 Stat. 667 (1868) (Treaty with the Navajo) 18

Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452 19

Act of Feb. 24, 1863, §§ 1-2, 12 Stat. 664, 665 19

Act of June 14, 1934, 48 Stat. 960, 961 18

Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 572 19-20

Pub. L. 92-470, 86 Stat. 783 (1972) 19

Pub. L. 98-498, 98 Stat. 1533 (1984) 19

RULES OF THE SUPREME COURT

Rule 10 12

Rule 29.6 iv

TABLE OF AUTHORITIES – Continued

Page

ARIZONA STATUTES

A.R.S. § 45-141 2-4

A.R.S. § 45-251 ..... 2-4, 6

A.R.S. § 45-252(a) 3

A.R.S. §§ 45-401.A and 45-401.B 16

A.R.S. §§ 45-401 through 45-704 (Arizona Groundwater Code) 3, 5-6, 16, 25

A.R.S. § 45-411 5

A.R.S. § 45-412.A 5

A.R.S. § 45-451.A.1 3

A.R.S. § 45-453 3

A.R.S. § 45-562.B 6

OTHER STATUTES

Alaska Stat. § 46.15.030 (1987) 27

Colo. Rev. Stat. § 37-92-102 (Supp. 1987) 27

Haw. Rev. Stat. Ch 164C 27

Idaho Code §§ 42-101, -103, -226, -229, -230 (Supp. 1988) 27

Kan. Stat. Ann. §§ 82a-703, -707 (1984) 27

Mont. Code Ann. §§ 85-2-101, -102(191) (1999) 27

Neb. Rev. Stat., ch. 46, art. 6 27

Nev. Rev. Stat. §§ 533.025, -.030, 534.020 (1995) 27

N.M. Stat. Ann. § 72-12-1 (1997) 27

TABLE OF AUTHORITIES – Continued

Page

N.D. Cent. Code § 61-01-01 (1995) 27

Okla. Stat. tit. 60, § 60..... 27

Or. Rev. Stat. §§ 537.120, -.515, -.525, -.535 (1997) 27

S.D. Codified Laws Ann. §§ 46-1-1 to 46-1-3 (1999) 27

Utah Code Ann. § 73-1-1 (1989)..... 27

Wash. Rev. Code Ann. §§ 90.03.010, 90.44.020, 90.44.035, 90.44.040 (1987)..... 27

Wyo. Stat. §§ 41-3-101, -901, -905, -930, -936 (1999) 27

EXECUTIVE ORDERS

Executive Order of October 29, 1881 (Fort Huachuca) 18

Executive Order of May 17, 1883 (Fort Huachuca) 18

List and Index of Presidential Executive Orders: Unnumbered Series (1789-1941) (Clifford L. Lord ed., Michael Glazier, 1979) (1944) 18

Proclamation No. 7263, 65 Fed. Reg. 2817 (2000) 19

BOOKS, ARTICLES AND REPORTS

T.W. Anderson, *et al.*, U.S. Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* (1992) 27-28

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TABLE OF AUTHORITIES – Continued

Page

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John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L. J. 657 (1988) 6, 27

Lamond R. Mills, *Federally Reserved Rights to Underground Water – A Rising Question in the Arid West*, 1973 Utah L. Rev. 43 28

Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, Dec. 5, 1960. 8

Leonard Rice and Michael D. White, *Engineering Aspects of Water Law* (1987) 17, 28

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TABLE OF AUTHORITIES – Continued

Page

Soil Conservation Service, U.S. Dep't of Agriculture, *Report on Water Use in the Little Colorado Basin* (1981) 8

A. Dan Tarlock, *Law of Water Rights and Resources* (1999) 28

U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998* (118th ed. 1998) 14

U.S. Dep't of Agriculture, *Land Areas of the National Forest System As of September 1997* (1998) 14

U.S. Geological Survey, Water Supply Paper No. 2300, *National Water Summary 1985 – Hydrologic Events and Surface-Water Resources* (1986) 7

University of Arizona, *Arizona Statistical Abstract* (1993) 14

Waters and Water Rights (Robert E. Beck ed. 1991, 1994) 17, 27-28

MAPS IN APPENDIX

App. G. U.S. Geological Survey, *Arizona's Principal Aquifers, in Principal Aquifers of the 48 Contiguous States* (July 1, 1998) 5, 16-17

App. H. National Geographic Society, *Federal Lands in the Fifty States* (Oct. 1996) 13-15

App. I. Bureau of Land Management, U.S. Dep't of the Interior, *Arizona Surface Management Responsibility* (2nd preliminary ed. May 19, 1998) 14, 17, 20

TABLE OF AUTHORITIES – Continued

Page

App. J. *Arizona's Principal Aquifers and Land Ownership, printed from* U.S. Geological Survey, *Principal Aquifers of the 48 Contiguous States* (July 1, 1998) and Arizona Land Dep't, *Land* (digital file 1997) 14, 16-17, 20, 28

MISCELLANEOUS

Shoshone Tribe v. Wyoming, 57 U.S.L.W. 3319 (U.S., Nov. 1, 1988) (cross-petition for a writ of certiorari), *cert. denied*, 492 U.S. 926 (1989) 12

PETITION FOR WRIT OF CERTIORARI

Petitioners Salt River Valley Water Users' Association, a private corporation organized under Arizona law, and Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, respectfully request that a writ of certiorari issue to review the portion of the opinion of the Supreme Court of Arizona entered on November 19, 1999 on the question presented herein, which is whether federal reserved rights extend to groundwater that is not appropriable under Arizona law.

OPINION BELOW

The opinion below of the Supreme Court of Arizona is reported as *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (sometimes referred to in this petition as *"Gila River III"* in order to distinguish it from cases cited in the decision below as *Gila River I* and *Gila River II*) and is set forth in Appendix A to this petition.

JURISDICTION

The decision of the Supreme Court of Arizona in *Gila River III* was rendered on November 19, 1999. No motions for rehearing were filed in the Supreme Court of Arizona. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The decision below resolved a substantial federal question regarding the doctrine of federal reserved

water rights. The ultimate resolution of the question lies exclusively within the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED IN THE CASE

1. Arizona Revised Statutes ("A.R.S.") § 45-141.A provides in relevant part:

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

2. A.R.S. § 45-251 provides in relevant part:

> In this article, unless the context otherwise requires:
>
> * * *
>
> 2. 'General adjudication' means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.
>
> 3. 'Person' means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or a community or any other legal entity, public or private.
>
> * * *

> 7. 'River system and source' means all water appropriable under § 45-141 and all water subject to claims based upon federal law.

3. Arizona statutory provisions constituting the Groundwater Code, A.R.S. §§ 45-401 through 45-704, the provisions relevant to this petition being portions of 45-451.A.1 and 45-453. A.R.S. § 45-451.A.1 provides: "In an active management area, a person may . . . [w]ithdraw and use groundwater only in accordance with" specified provisions of the Groundwater Code. A.R.S. § 45-453 provides in part: "In areas outside of active management areas, a person may . . . [w]ithdraw and use groundwater for reasonable and beneficial use. . . . "

STATEMENT OF THE CASE

I. THE NATURE AND SCOPE OF THE PENDING PROCEEDINGS

This petition concerns comprehensive general stream water rights adjudications pending in state court in Arizona. The decision below was rendered in a consolidated action known as the Gila River adjudication, which will determine all rights to water within the watersheds of the Salt, Verde, Gila, Agua Fria, Santa Cruz and San Pedro rivers. The Little Colorado River watershed is the subject of a similar general stream adjudication.

The purpose of the pending general stream adjudications is to determine "the nature, extent and relative priority" of rights to use the waters of the particular "river system and source." A.R.S. §§ 45-251(2), -252(a). Together, the pending adjudications encompass most of

Arizona and will determine the vast majority of the water rights in the state not involving the main stem of the Colorado River.

The waters included in each "river system and source" at issue in the pending adjudications in Arizona are "all water appropriable under [A.R.S.] § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251.[1] Under Arizona law, appropriable water is limited to surface water, water flowing in definite underground channels, and a judicially defined category of underground water known as "subflow." *See* A.R.S. § 45-141; *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*").[2] Appropriable water – "surface" water, "water flowing in definite underground channels," and "subflow" – is governed by the doctrine of prior appropriation, which this Court has summarized as follows:

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[1] The United States and Indian tribes were joined as parties to the pending adjudications in Arizona courts pursuant to the McCarran Amendment, 43 U.S.C. § 666, which authorizes such joinder "for the adjudication of rights to the use of water of a river system or other source. . . ." Jurisdiction of Arizona courts over the United States and Indian tribes in the pending adjudications was upheld in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) and *United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985).

[2] Subflow is "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 380 (Ariz. 1931).

> [T]he one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle.

Arizona v. California, 373 U.S. 546, 555 (1963) (footnote omitted).

Underground water not flowing in a definite underground channel and not constituting subflow is known as "groundwater" or "percolating groundwater." App. A8-A9. The principal groundwater aquifers in Arizona are shown in App. G.

Under Arizona law, groundwater is governed by the doctrine of reasonable use or by the Groundwater Code, A.R.S. §§ 45-401 through 45-704.[3] The doctrine of reasonable use permits an overlying landowner to withdraw as

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[3] The basic provisions of the Groundwater Code are summarized in *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981), *appeal dismissed*, 457 U.S. 1101 (1982). The Code provided for the establishment of "active management areas" ("AMAs"), which are geographical areas where active management practices are necessary to preserve the existing supply of groundwater for future needs. *See* A.R.S. §§ 45-411, 45-412.A. Each AMA encompasses one or more groundwater basins. *Town of Chino Valley*, 638 P.2d at 1325. The Code authorizes continuation of specified historic uses of groundwater in AMAs and expansion of withdrawals for certain municipal and domestic uses, but prohibits most other new uses of groundwater in AMAs. *Id.* It also regulates transportation of groundwater. *Id.* A primary goal of the Code for most aquifers is to achieve and maintain safe-yield, which is a long-term balance between groundwater withdrawals and recharge. Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Vol. I, Inventory and Analysis* 35 (1994)

much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply. App. A10 n. 3; *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). In contrast to state and federal rights to appropriable water in Arizona, use of groundwater in Arizona is not subject to a priority scheme. *Gila River II*, 857 P.2d at 1240 (groundwater "is excluded from the legal rules applying to prior appropriation").[4]

Under A.R.S. § 45-251, the scope of the pending adjudications includes water subject to claims based upon federal law. Claims by the United States and Indian tribes to water within the State of Arizona are based in part upon a rule of substantive federal law known as the doctrine of federal reserved water rights, which was expressly enunciated by this Court in *Winters v. United States*, 207 U.S. 564 (1908). *Cappaert v. United States*, 426 U.S. 128 (1976) summarized the reserved rights doctrine as follows:

("*ADWR Assessment*"). In the Pinal AMA, the goal is to "preserve existing agricultural economies . . . for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses." A.R.S. § 45-562.B. Many of the specific provisions of the Groundwater Code are also discussed in John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L. J. 657 (1988) and Jon L. Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U. Colo. L. Rev. 471 (1982).

[4] For a more complete discussion of the historical derivation and application of Arizona's bifurcated system of water rights, see *Southwest Cotton*, *Gila River II* and Leshy & Belanger, *supra*.

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138. The doctrine applies to Indian reservations as well as other federal enclaves such as national parks, monuments, forests, wildlife preserves, and military bases. *Id.* at 138-39; *Arizona v. California*, 373 U.S. at 601.

In the pending adjudications in Arizona, the United States and Indian tribes are pursuing claims to enormous quantities of water and are asserting that the federal reserved rights doctrine extends to groundwater. In fact, the majority of the water claimed for Indian reservations involved in these cases is implicitly for groundwater.[5]

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[5] Filings with the Arizona Department of Water Resources reflect that unresolved claims to water in the Gila adjudication by Indian tribes, or the United States acting on their behalf, exceed 2.8 million acre-feet annually, while in the Little Colorado adjudication the Hopi and Navajo Indian tribes claim more than 380,000 acre-feet annually. These figures do not include claims for unquantified amounts of groundwater. The surface water supply is woefully insufficient to satisfy even the Indian claims, let alone other existing uses; typically, the annual surface water supply is approximately 1,300,000 acre-feet in the Gila River basin and less than 180,000 acre-feet in the Little Colorado River basin. *See* U.S. Geological Survey, Water Supply Paper No. 2300, *National Water Summary 1985 – Hydrologic*

II. THE RULINGS BELOW

In 1986, the trial court judge in the Gila River adjudication identified various legal issues that he would resolve before proceeding to adjudicate individual claims. One such issue is whether federal reserved rights apply to groundwater. The trial court ruled in 1988 that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [practicably irrigable acreage] if the land is an Indian reservation." App. D23.

In 1989 the Arizona Supreme Court adopted a special procedural order providing for interlocutory appeals and certifications of important legal issues decided by the trial court. The procedural order is reproduced as Appendix A to the decision in *In re the Rights to the Use of the Gila River*, 830 P.2d 442, 456-59 (Ariz. 1992) ("*Gila River I*").[6] Pursuant to this order, in 1990 the Arizona Supreme

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Events and Surface-Water Resources 145-146 (1986); Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, Dec. 5, 1960, finding of fact no. 10, at 337 ("The Gila River, San Francisco River, and San Simon Creek are overappropriated, supply being insufficient to satisfy existing needs"); Soil Conservation Service, U.S. Dep't of Agriculture, *Report on Water Use in the Little Colorado Basin*, App. 2, at 5-17 (1981).

[6] In agreeing to "review the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication," the Arizona Supreme Court explained: "In a case of this magnitude, which is expected to continue for at least three or four decades, it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *Gila River I*, 830 P.2d at 445 n. 2.

Court granted interlocutory review of the trial court's decision extending the federal reserved rights doctrine to groundwater; the Supreme Court designated the question as Issue 4 and stated it as follows: "Is non-appropriable groundwater subject to federal reserved rights?" *See* App. A8 n. 2; *Gila River I*, 830 P.2d at 445.[7] Issue 4 was answered by the Arizona Supreme Court in its opinion filed on November 19, 1999, in which the court held that federal reserved rights to water "extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a [federal] reservation." App. A30.[8]

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[7] For purposes of briefing and oral argument, the Arizona Supreme Court consolidated Issue 4 with Issue 5: "Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?" App. A8 n. 2. The Arizona Supreme Court decision of November 19, 1999 answered Issue 5 in the affirmative. *See* App. A6, A30. This petition does not seek review of the ruling by the Arizona Supreme Court on Issue 5.

[8] In both the trial court and the Arizona Supreme Court, the petitioners herein argued that the doctrine of federal reserved water rights does not apply to groundwater. The respondents herein – the United States, the various Indian Tribes, and Silas Kisto, an individual Native American – argued in favor of the application of the doctrine to groundwater. The remainder of the parties to the proceeding before the Arizona Supreme Court argued against extending the doctrine to groundwater. *Gila River III* was issued in the Gila River adjudication. Issue 4 has not been addressed in the Little Colorado adjudication. However, since the same question arises in both the Gila River and Little Colorado River adjudications pending in Arizona, parties from both proceedings submitted briefs to the Arizona Supreme Court on Issue 4 and, therefore, parties to both cases are listed as parties in this petition.

In the decision below, the Arizona Supreme Court recognized that this Court has never held that there is a federal reserved right to groundwater, App. A19, and that the Supreme Court of Wyoming, in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), *aff'd on other grounds by an equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), declined to find a reserved right to groundwater. App. A16. According to the Arizona Supreme Court, however, this Court's previous decisions on the doctrine of federal reserved water rights lead to the conclusion that the doctrine applies not only to surface water but to groundwater. App. A19 – A23. The decision below therefore rejected the holding entered by the Wyoming Supreme Court in *Big Horn*. App. A24, A30.

REASONS FOR GRANTING THE WRIT

I. APPLICABILITY, IF ANY, OF THE FEDERAL RESERVED RIGHTS DOCTRINE TO GROUNDWATER IS AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION THAT HAS PROMPTED CONFLICTING STATE COURT DECISIONS

The doctrine of federal reserved water rights was recognized by this Court in 1908 in *Winters*. The Court held that when the Fort Belknap Indian Reservation was established in 1888 in what was then the Territory of Montana, the United States had, by implication, reserved sufficient unappropriated water from the Milk River, which flowed through the reservation, to accomplish the reservation's purpose. 207 U.S. at 576-77. Subsequent

decisions of the Court refined the nature and scope of the federal reserved water rights doctrine. *See Arizona v. California; United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Cappaert; United States v. New Mexico*, 438 U.S. 696 (1978).

With respect to the scope of *Winters* rights, *Cappaert* explained that the federal reserved rights doctrine applies to "appurtenant water then unappropriated" in navigable and nonnavigable streams. 426 U.S. at 138. Although *Cappaert* held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," *id.* at 143, the Court found that the reserved water right sought to be protected in *Cappaert* was "surface water." *Id.* at 142. *Cappaert* specifically recognized that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater" and did not purport to determine whether groundwater is subject to the reserved rights doctrine. *Id.*

As recognized by the decision below, the nature and scope of federal reserved rights are questions of federal substantive law. App. A15. In the absence of a binding federal court decision, the issue of the applicability of the doctrine of federal reserved rights to groundwater has been addressed by state courts in an effort to interpret and predict federal law. The Supreme Court of Wyoming concluded in *Big Horn* that there is no federal reserved right to groundwater. 753 P.2d at 100.[9] In the decision

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[9] The *Big Horn* case, like *Gila River III*, arose out of a system-wide adjudication of water rights, including reserved rights of

below which is the subject of this petition, the Supreme Court of Arizona reached the opposite conclusion. App. A30. The situation presented by this petition falls squarely within the provisions of Rules 10(b) and 10(c) of the Rules of this Court since there is a direct conflict between the courts of last resort of Wyoming and Arizona on an important question of federal law that has not been, but should be, settled by this Court.

The conflict between *Big Horn* and the decision below on the question presented by this petition was addressed in a dissenting opinion in *Confederated Salish and Kootenai Tribes v. Clinch*, No. 97-609, 1999 WL 1271753 (Mont. Dec. 30, 1999). The majority of the Supreme Court of Montana enjoined the Montana Department of Natural Resources and Conservation ("DNRC") from issuing water use permits on the Flathead Indian Reservation until tribal water rights have been quantified. 1999 WL 1271753 at *6. The dissenting justice stated in part:

> The majority's holding apparently precludes DNRC from issuing permits for groundwater use . . . even though uncertainty exists as

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the United States and the Arapaho and Shoshone Indian tribes. In the trial court, the Indian tribes claimed an alleged reserved right to make existing and future use of groundwater. The trial court decided that there is no federal reserved right to groundwater. 753 P.2d at 100. That decision was appealed by the United States and the tribes to the Wyoming Supreme Court, which upheld the trial court ruling and specifically held that "the reserved water doctrine does not extend to groundwater". *Id.* The Indian tribes unsuccessfully asked this Court to review the Wyoming Supreme Court's ruling rejecting a reserved right to groundwater. *See Shoshone Tribe v. Wyoming*, 57 U.S.L.W. 3319 (U.S., Nov. 1, 1988) (questions presented in cross-petition for certiorari), *cert. denied*, 492 U.S. 926 (1989).

> to whether groundwater is included within the reserved rights doctrine. *See Big Horn* . . . and . . . *Gila River* [*III*]. . . . Without analysis, the majority apparently assumes that groundwater is included within the Tribes' reserved water right.
>
> The practical consequences of the majority's decision will be significant and will deprive some Montana citizens of one of life's basic necessities, the use of water.

1999 WL 1271753 at *7 (Rodeghiero, J., dissenting).

Resolution by this Court of the issue presented will have a significant impact throughout the United States. According to the map submitted with this petition as Appendix H, the federal domain covers one-third of the nation. As reflected in the map, the number and size of federal reservations are particularly extensive in the western states.[10] For example, more than half of

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[10] To further illustrate the scope of federal reservations in the West, the following table sets forth the approximate acreage reserved by the federal government for Indian reservations and national forests in selected states. Numbers exceeding one million have been rounded to the nearest one million. The other numbers have been rounded to the nearest 100,000.

State	Total area	Tribal land	National forest
Arizona	73,000,000	20,000,000	11,000,000
California	102,000,000	500,000	21,000,000
Colorado	67,000,000	800,000	14,000,000
Idaho	53,000,000	400,000	20,000,000
Montana	94,000,000	3,000,000	17,000,000
Nevada	71,000,000	1,000,000	6,000,000
New Mexico	78,000,000	8,000,000	9,000,000
Oregon	62,000,000	700,000	16,000,000
Utah	54,000,000	2,000,000	8,000,000
Washington	44,000,000	2,000,000	9,000,000

the land in Arizona consists of federal reservations. *See supra* note 10; University of Arizona, *Arizona Statistical Abstract* 173-177 (1993); App. I, J (maps showing categories of land ownership in Arizona). Moreover, throughout Arizona and other western states, the federal reservations are interspersed with other types of lands, including federal holdings not constituting reservations. *See* App. H-J. In view of the number, size and location of federal enclaves and the finite supply of water in arid states, the issue presented in this petition is of direct and substantial importance to the entire western region of the United States.

Further, water rights adjudications involving claims to federal reserved water rights are pending in the states of Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, in addition to Arizona.[11] By resolving the applicability of the reserved rights doctrine to groundwater, this Court will answer a question that is

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See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998* at 237 (118th ed. 1998); Division of Real Estate Services, Bureau of Indian Affairs, *Annual Report of Indian Lands* (Dec. 31, 1997) <http://www.doi.gov/bia/realty/report97.html>; U.S. Dep't of Agriculture, *Land Areas of the National Forest System As of September 1997* at 14-35 (1998). In addition to Indian reservations and national forests, the federal government owns tens of millions of acres in western states in a wide variety of other enclaves, such as military bases, research facilities, national parks, monuments, wildlife refuges, recreation areas, wilderness areas, and grasslands. *See* App. H.

[11] *See* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 Land & Water L. Rev. 9 (1995); Peter W. Sly, *Reserved Water Rights Settlement Manual* 194-211 (1988).

of critical importance to the completion of numerous cases.

The issue presented is also of potential importance in eastern and midwestern states. Collectively, those states account for more than sixty Indian reservations and hundreds of other federal enclaves, including national parks, national forests, and military installations. *See* App. H. As the United States population continues to grow, availability of an adequate supply of water becomes increasingly critical in every geographic region of the nation. Indian tribes, meanwhile, are becoming more active in seeking to develop their lands and increase their water usage. "[T]he basic questions regarding how and if the *Winters* doctrine applies in eastern states remain unresolved." Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. Land Use & Envtl. L. 1 (1990).

II. THE DECISION BELOW WOULD CREATE GRAVE, UNIQUE PROBLEMS THROUGHOUT ARIZONA

Extending the federal reserved rights doctrine to nonappropriable groundwater raises the prospect of entitling a few large Indian reservations established in the nineteenth century to monopolize the supply of groundwater in Arizona. The consequences could be disastrous for most of Arizona, including not only cities, industries, and farmers, but also state trust lands and many other federal reservations. Creating a privileged class of a few federal pumpers of groundwater would also produce discriminatory, anomalous results.

An appreciation of the havoc that would be wreaked by the lower court's decision requires an examination of Arizona's water supply and demand, basic hydrology, and the pattern and history of land ownership in Arizona. The fundamental problem is that water demand in Arizona exceeds the supply. "[T]here is not enough water to meet everyone's demands." *Superior Court*, 697 P.2d at 663.

Groundwater is and will remain an important component of Arizona's mix of water resources. "[T]he people of Arizona are dependent in whole or in part upon groundwater basins for their water supply. . . . " A.R.S. § 45-401.A. "Groundwater is the primary water supply in most areas of the State." *ADWR Assessment, supra*, at 9. Many Arizona cities and towns, as well as various industrial users, must rely extensively on groundwater because they have no practical, affordable alternative. *See id.* at 6, 52.

On average, groundwater withdrawals exceed natural recharge to Arizona's aquifers. *See* A.R.S. § 45-401.A; *ADWR Assessment* at 9, 51. In response to a water shortage, twenty years ago the Arizona Legislature enacted the Groundwater Code, which is designed to conserve and protect groundwater supplies. A.R.S. § 45-401.B.

Nearly all of the groundwater in Arizona is located in large aquifers underlying vast expanses of the state. *See* App. G; *ADWR Assessment* at 5-10. The aquifers constitute a common source of supply for overlying lands. *See* App. J; *ADWR Assessment* at 9-10. In response to gravity and pressure, groundwater flows considerable distances

through aquifers. *See* 3 *Waters and Water Rights* § 18.02 (Robert E. Beck ed. 1991); Leonard Rice and Michael D. White, *Engineering Aspects of Water Law* 123-24 (1987). Aquifers are not static reservoirs; they are dynamic systems that receive an inflow of recharge, transmit groundwater across large distances, and discharge groundwater through seeps and springs into surface water sources. *Waters and Water Rights*; Rice & White at 119, 124. Pumping from an aquifer causes both local and regional drawdowns in the water table that affect adjacent lands. *Waters and Water Rights* § 18.03, at 13-14; Rice & White at 125-26.

As a result of an interlocking pattern of land ownership, operation of a well in Arizona commonly affects various categories of land. In much of Arizona, Indian reservations and other federal lands are interspersed with state and private lands in a checkerboard pattern overlying a common aquifer. *See* App. G, I, J.[12] Under these circumstances, groundwater withdrawals by one landowner unavoidably diminish the supply available to other lands sharing the same aquifer. The affected lands include cities, such as the Phoenix and Tucson metropolitan areas, which are in close proximity to federal reservations.

Because this Court has held that a federal reserved right to surface water vests when the reservation is

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[12] Nearly three-fourths of the land in Arizona is owned by the federal government, including numerous Indian reservations, national parks, national monuments, historic sites, recreation areas, wildlife refuges, national forests, military installations, and public domain under the jurisdiction of the Bureau of Land Management. App. A14, I, J.

established (*see, e.g., Cappaert*, 426 U.S. at 138), the date on which a given reservation was created is potentially of great importance in determining associated water rights. Creation of federal enclaves in Arizona has spanned more than 100 years and is continuing to the present. The Gila River Indian Reservation, for instance, was initially established in 1859 and subsequently was enlarged on seven occasions from 1876 to 1915. *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1388 (Ct. Cl.), *cert. denied*, 419 U.S. 1021 (1974). Other examples of federal reservations in Arizona established in the nineteenth century include:

- Navajo Reservation, 1868. 15 Stat. 667 (1868) (Treaty with the Navajo).
- White Mountain Apache Reservation, 1871. *United States v. Wightman*, 230 F. 277, 278 (D. Ariz. 1916).
- San Carlos Apache Reservation, 1872. *Wightman*, 230 F. at 278.
- Fort Huachuca, 1881 and 1883. Executive Orders of October 29, 1881 and May 17, 1883. *See List and Index of Presidential Executive Orders: Unnumbered Series (1789-1941)*, at 98, 105 (Clifford L. Lord ed., Michael Glazier, 1979) (1944).
- Hopi Reservation, 1882. *See* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 805 (1904); *see also* Act of June 14, 1934, 48 Stat. 960, 961.

Relatively recent Indian reservations in Arizona include the Tonto Apache Reservation and the Zuni Heaven Reservation, which were authorized by Congress

in 1972 and 1984, respectively. *See* Pub. L. 92-470, 86 Stat. 783; Pub. L. 98-498, 98 Stat. 1533. Just last month, President Clinton established the Agua Fria National Monument, which consists of approximately 71,000 acres in central Arizona. Proclamation No. 7263, 65 Fed. Reg. 2817 (2000). The presidential proclamation establishing the new monument contains the following provision regarding water rights: "There is hereby reserved, as of the date of this proclamation and subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established." *Id.* at 2818.

The ruling below will also directly affect the State of Arizona, which owns land in every area of the state. In 1850, Congress "reserved for the purpose of being applied to schools" in the Territory of New Mexico, which included the land that subsequently became the State of Arizona, sections 16 and 36 of every township.[13] This reservation of land for school purposes was expressly extended to the Territory of Arizona upon its creation by Congress in 1863.[14] When Arizona became a state, it received a grant from the federal government of sections 2, 16, 32 and 36 in every township for the support of public schools, plus specified acreages for other designated purposes. *See* Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 572 (1910); *Lassen v. Arizona*, 385 U.S. 458, 460 n. 2 (1967). The granted lands are held by the state in trust. *Fain Land & Cattle Co. v. Hassell*, 790 P.2d

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[13] Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452.

[14] Act of Feb. 24, 1863, §§ 1-2, 12 Stat. 664, 665.

242, 244 (Ariz. 1990).[15] Many of the state parcels are part of a checkerboard pattern with federal lands. *See* App. I, J.

With this background, it is evident that subjecting Arizona groundwater to a federal reserved rights doctrine that includes a priority scheme that does not apply to groundwater rights based upon state law would create a plethora of serious problems.[16] First, under the decision below, most of the heretofore non-appropriable groundwater would be controlled by a few federal enclaves that were established many years ago. Most other landowners, despite longstanding dependence upon groundwater usage consistent with state law, would be forced to

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[15] Disposal of the trust lands is subject to very restrictive conditions that were imposed by Congress in the Enabling Act. *Hassell*, 790 P.2d at 244.

[16] In the decision below, the Arizona Supreme Court did not expressly hold that federal reserved rights to groundwater have priority dates. However, the court appears to have assumed, without stating, that any federal reserved right to groundwater vests when a reservation is established, regardless of the timing and extent of historic pumping, if any, by the reservation. In describing the reserved rights doctrine, the court below quoted the passage in *Cappaert* that "a reserved right [to surface water] . . . vests on the date of the reservation and is superior to the rights of future appropriators." App. A15 (quoting 426 U.S. at 138). The court below also stated that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion . . . . " App. A27. If this Court determines that there are no federal reserved rights to groundwater, or alternatively, that such rights exist but are governed by Arizona law, which does not allocate groundwater based upon a priority scheme, the problems discussed in this petition would be much less significant.

cease or sharply curtail their pumping, causing extensive dislocation and hardship.[17]

Second, some of the landowners with junior rights who would be adversely affected by the decision below are federal enclaves that rely heavily on groundwater due to their geographical location or lack of rights to sufficient surface water. An example of this type of conflict would be in the vicinity of Tuba City, Arizona, where pumping from the N Aquifer for use on a portion of the Navajo Reservation established in 1900 diminishes the supply available to the Hopi Reservation established in 1882. A second illustration is competing uses by the

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[17] One of the earliest and largest federal enclaves is the Gila River Indian Reservation, which consists of approximately 374,000 acres located in central Arizona near the Phoenix metropolitan area. The Gila River Indian Community ("GRIC") has filed a claim in the Gila River adjudication for more than 1,500,000 acre-feet of water, a quantity exceeding the average annual water supply of the Gila River which flows through portions of the reservation. Historically, the water needs of the reservation were served primarily by surface water flows. *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852, 854 (Ct. Cl. 1982). The metropolitan areas located in close proximity to the reservation use substantial quantities of groundwater to meet their municipal needs. *See ADWR Assessment, supra*, at 75-81. In a filing in the trial court just last month, GRIC stated that it "demands that the Salt River Project . . . and all other non-Indians, halt all pumping of underground water that interferes with the water supply and water rights of the Community, and its members and Allottees, in accord with the recent decision of the Arizona Supreme Court on Interlocutory Issues 4 and 5." Response in Opposition to the Motion for Partial Summary Judgment Re Preclusive Effect of 1907 Sacaton Agreement at 12 (Jan. 26, 2000).

Navajo and Zuni Heaven Indian reservations. *See supra* p. 18.

Ironically, while the rationale of the reserved rights doctrine is that the United States implicitly reserved water needed to accomplish the purpose of each reservation, extending the federal reserved rights doctrine to groundwater would lead to defeating the purpose of some federal enclaves. Under the approach adopted in the decision below, pumping of groundwater by relatively new federal enclaves must yield to more senior federal landowners who may eventually "need" the water, even if the pumping causing interference is consistent with state law and is necessary to fulfill the purpose of the more recent reservation. Similarly, to the extent that state trust lands become victims of giving senior federal enclaves a reserved right to groundwater, the decision below may impede fulfillment of Congress' purpose in reserving territorial lands in 1850 and subsequently granting millions of acres to Arizona for long term support of schools and other public purposes when the state entered the Union.

Third, the decision below lacks mutuality and unfairly discriminates against groundwater pumpers who lack senior federal reserved rights. Under the application of federal reserved rights adopted by the Arizona Supreme Court, a federal enclave having a senior priority date to groundwater can limit or prohibit pumping by adjacent landowners. The court did not adopt the converse, however. Landowners in Arizona whose pumping is based upon state law have no right to limit pumping by others – federal reservations, private landowners, or the

State of Arizona – that have more recent priority dates but are complying with state law.

Fourth, unlike federal reserved rights to appropriable water, which share many of the attributes of state law appropriative rights and are plugged into the state law system of administration of surface water, administering federal reserved rights to groundwater in Arizona would necessitate creation of a new common law system unique to such rights and antithetical to state law rights to groundwater. As a practical matter, Arizona would be forced to abandon existing state law governing groundwater and substitute a priority scheme.

III. THE RULING BELOW IS NOT MANDATED BY PREVIOUS DECISIONS OF THIS COURT AND UNNECESSARILY SUPPLANTS STATE LAW

It is not necessary to give the earliest federal reservations a privileged position over other federal, state and private landowners dependent upon groundwater in Arizona. State law should be borrowed as the federal rule of decision governing use of groundwater by federal enclaves. Adopting state law is appropriate where, as here, there is no need for a uniform national rule, application of state law would not frustrate federal policy or functions, and creation of an inconsistent federal rule could be disastrous for the state and private landowners and even for many federal enclaves. *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79 (1994).

In the opinion below, the Arizona Supreme Court rejected borrowing state law as the rule of decision for federal rights to groundwater, reasoning that this Court's decisions in *United States v. New Mexico*, *Cappaert*, and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) preclude deference to state water law when the reserved water rights doctrine is at issue. App. A20-A24.

Petitioners respectfully disagree with the Arizona Supreme Court's analysis of this Court's previous decisions. With the exception of the Colorado River, which is governed by unique rules, all of this Court's cases establishing and defining federal reserved water rights involved surface water subject to the doctrine of prior appropriation under state law. With respect to surface water, limiting federal reservations to state law appropriative rights would preclude many of them from diverting such water; under a priority system based upon dates of diversion and beneficial use, appropriative rights of many federal reservations would be too junior to be satisfied. With respect to groundwater, however, it is not necessary to depart from Arizona law. Each federal reservation in Arizona is entitled by state law to pump sufficient groundwater from beneath its land to fulfill its purpose.[18]

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[18] As explained *supra* p. 6, the doctrine of reasonable use does not include a priority system. It permits an overlying landowner to capture as much groundwater as can reasonably be used on the overlying land. With respect to federal enclaves in Arizona that are located in whole or in part within an AMA, in which state law restricts development of new wells and expansion of agricultural land irrigated with groundwater, petitioners note that the state has never attempted to enforce the

Moreover, a consistent theme in this Court's decisions on federal reserved water rights has been to *integrate* federal water rights into the various state law systems and minimize interference with state law rights. After a federal reserved right is established and quantified, it is administered in essentially the same manner as rights that are based upon the doctrine of prior appropriation. Under the decision below, however, such integration of groundwater rights would be impossible. Groundwater rights that are based upon a priority scheme cannot be integrated with a state law system that does not recognize priority dates. Implementing the decision below would inevitably disrupt the state law system and compel abandoning it in favor of a priority scheme for all pumpers. It is highly improbable that Congress and the executive branch, in creating federal enclaves in Arizona, implicitly viewed the state's doctrine of reasonable use as being inadequate and intended to supplant state law with a fundamentally different and inconsistent regime to govern use of groundwater by federal reservations.

Furthermore, although the *Winters* doctrine developed in response to the prior appropriation system followed in the West, the specter of *Winters* rights also haunts states which follow the riparian system. For example, the State of Florida has adopted a hybrid statutory

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Groundwater Code on federal reservations, and in any event each reservation within an AMA apparently meets the requirements under the Code for grandfathered rights which, coupled with the reservation's other water rights, should provide the reservation with access to a sufficient quantity of water to fulfill the reservation's purpose.

permit system to integrate water allocation characteristics of the prior appropriation doctrine into the traditional riparian system. *See* Shore & Straus, *supra*, at 9. In order to avoid litigating the application of *Winters* rights in Florida, the State of Florida and the Seminole Tribe of Florida agreed to a settlement of then-pending litigation by entering into a water rights compact that recognized and defined federal water rights for the tribe. *Id.* at 2. Under the compact, the tribe achieved state and federal recognition of substitute federal water rights in exchange for alleged *Winters* doctrine rights. *Id.* at 12. The effect was to adopt state law as the federal rule. Under the compact, the tribe regulates its own water use but must follow the essential aspects of Florida's groundwater management plans and federal environmental laws. *Id.* at 12-13. Thus, the tribe's rights are integrated into the Florida system without unduly interfering with existing rights that are based upon state law.

The result achieved by the Florida-Seminole compact can only be achieved throughout the United States if this Court applies state law as the federal rule of decision where necessary to integrate federal rights into state law systems that are incompatible with the *Winters* doctrine. This would then provide a workable resolution to the problems created by attempting to integrate federal and state water claims in jurisdictions such as Arizona where different legal rights attach to different categories of water under state law.[19]

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[19] Thirteen of the nineteen western states that apply the doctrine of prior appropriation extend its application to all hydrologically connected surface water and groundwater.

Finally, extending the *Winters* doctrine to groundwater fails to consider fundamental differences between surface water and percolating groundwater. It is logical to assume that in establishing federal reservations in the nineteenth and early twentieth centuries, the United States intended to use unappropriated surface water, which was the only known water source available and was readily ascertainable, in order to fulfill the purpose of the reservation. It is not plausible, however, to assume that the federal government intended to rely upon a water source, such as groundwater, that was virtually unknown when the reservation was established.[20]

Alaska Stat. § 46.15.030 (1987); Colo. Rev. Stat. § 37-92-102 (Supp. 1987); Idaho Code §§ 42-101, -103, -226, -229, -230 (Supp. 1988); Kan. Stat. Ann. §§ 82a-703, -707 (1984); Mont. Code Ann. §§ 85-2-101, -102(191) (1999); Nev. Rev. Stat. §§ 533.025, -.030, 534.020 (1995); N.M. Stat. Ann. § 72-12-1 (1997); N.D. Cent. Code § 61-01-01 (1995); Or. Rev. Stat. §§ 537.120, -.515, -.525, -.535 (1997); S.D. Codified Laws Ann. §§ 46-1-1 to 46-1-3 (1999); Utah Code Ann. §§ 73-1-1 (1989); Wash. Rev. Code Ann. §§ 90.03.010, 90.44.020, 90.44.035, 90.44.040 (1987); Wyo. Stat. §§ 41-3-101, -901, -905, -930, -936 (1999); Leshy & Belanger, *supra*, at 725 n. 453. However, in addition to Arizona, a number of other western states apply different legal principles to various categories of surface water and groundwater. *See generally* 6 *Waters and Water Rights*, *supra*, at 246 (1994) (discussing California's correlative rights to groundwater); *City Mill v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929) (adopting correlative rights to groundwater) and Haw. Rev. Stat. Ch. 164C (establishing administrative control over groundwater when sustainable yields are threatened); Okla. Stat. tit. 60, § 60; Neb. Rev. Stat., ch. 46, art. 6; *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. 1989, *writ. denied*).

[20] Not until the late 1800s did groundwater pumping in Arizona begin on even a limited scale. T.W. Anderson, *et al.*, U.S.

Further, groundwater is "[l]ike wild animals free to roam as they please" and is "the property of no one." *Town of Chino Valley*, 638 P.2d at 1328. The decision below is akin to prohibiting off-reservation hunting of migratory game that may eventually move onto a federal reservation. It is settled, however, that an Indian tribe or other federal reservation cannot claim to "own" wild game, even when the animals are present on the reservation. *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1283 (9th Cir. 1981). "If the fish and game are migratory, the state interest becomes quite powerful." *Id.* Likewise, this Court should refuse to extend the federal reserved rights doctrine to groundwater, which is migratory and not subject to ownership until it has been captured and withdrawn from the underground supply.[21]

Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* B25, B62 (1992). Major pumping did not begin until the development of deep-well turbine pumps in the 1930s. *Id.* at B26.

[21] Numerous difficulties would be inherent in attempting to reserve groundwater for federal reservations. The exact flow of groundwater is difficult if not impossible to determine. *See* A. Dan Tarlock, *Law of Water Rights and Resources* § 4.03 (1999). In addition, pumping can induce groundwater to flow to a federal reservation and away from other lands, or vice versa. *See* 3 *Waters and Water Rights*, *supra*, at 13-14; Rice & White, *supra*, at 125-26; App. J. For a general discussion of fundamental differences between surface water and groundwater that militate against extending the reserved rights doctrine to groundwater, see Lamond R. Mills, *Federally Reserved Rights to Underground Water – A Rising Question in the Arid West*, 1973 Utah L. Rev. 43, 52-53.

CONCLUSION

As recognized in the decision below, this Court has not ruled on the federal question at issue – whether the federal reserved water rights doctrine applies to groundwater. This Court has also never rejected borrowing state law as the federal rule of decision where doing so will preserve state law and not frustrate a federal purpose. Petitioners respectfully submit that it is now time for this Court to decide this uniquely federal issue in order to resolve the direct conflict between the decisions of the supreme courts of Wyoming and Arizona and to provide guidance to courts that are attempting to integrate federal rights to water into state water law systems that apply different legal rules to different categories of water. It is unlikely that this Court will ever be presented with a more concrete example of the potentially disastrous impact of an unfettered application of the federal reserved water rights doctrine. Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SALMON, LEWIS & WELDON, P.L.C.
M. BYRON LEWIS
JOHN B. WELDON, JR.
STEPHEN E. CROFTON
4444 North 32nd Street, Suite 200
Phoenix, Arizona 85018

Attorneys for Petitioners
Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District

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